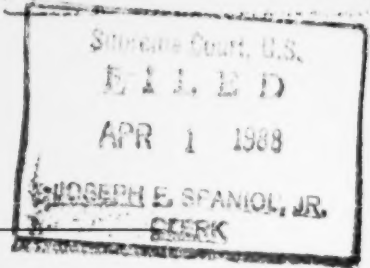


NO. 87-1390



IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1987

MAKAH TRIBE, et al.,  
Petitioners

v.

STATE OF WASHINGTON, et al.,  
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE  
BAD RIVER BAND OF LAKE SUPERIOR TRIBE  
OF CHIPPEWA INDIANS, ET AL.;  
(additional amici listed on inside cover)  
IN SUPPORT OF PETITIONERS

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April, 1988

## ADDITIONAL AMICI

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Big Lagoon Rancheria;  
Big Pine Band of Owens Valley Paiute-Shoshone;  
Cahuilla Band of Mission Indians;  
Campo Band of Mission Indians;  
Confederated Tribes of the Colville Reservation;  
Confederated Tribes of the Warm Springs Reservation of Oregon;  
Covelo Indian Community;  
Gila River Indian Community;  
Grand Traverse Band of Ottawa and Chippewa Indians;  
Klamath Tribe;  
La Jolla Band of Mission Indians;  
Lac Du Flambeau Band of Lake Superior Chippewa Indians;  
Manzanita Band of Mission Indians;  
Mescalero Apache Tribe;  
Morongo Band of Mission Indians;  
Paiute-Shoshone Indians of the Bishop Community;  
Pala Band of Mission Indians;  
Pechanga Band of Mission Indians;  
Redwood Valley Rancheria;  
Robinson Rancheria Citizen's Council;  
Rohnerville Rancheria;  
San Pasqual Band of Mission Indians;  
Santa Ynez Band of Mission Indians;  
Santa Ysabel Band of Mission Indians;  
Sault Ste. Marie Tribe of Chippewa Indians;  
Sherwood Valley Rancheria;  
St. Croix Chippewa Indians of Wisconsin;  
Timbisha Shoshone Tribe;  
Trinidad Rancheria; and  
Viejas Band of Capitan Grande Mission Indians

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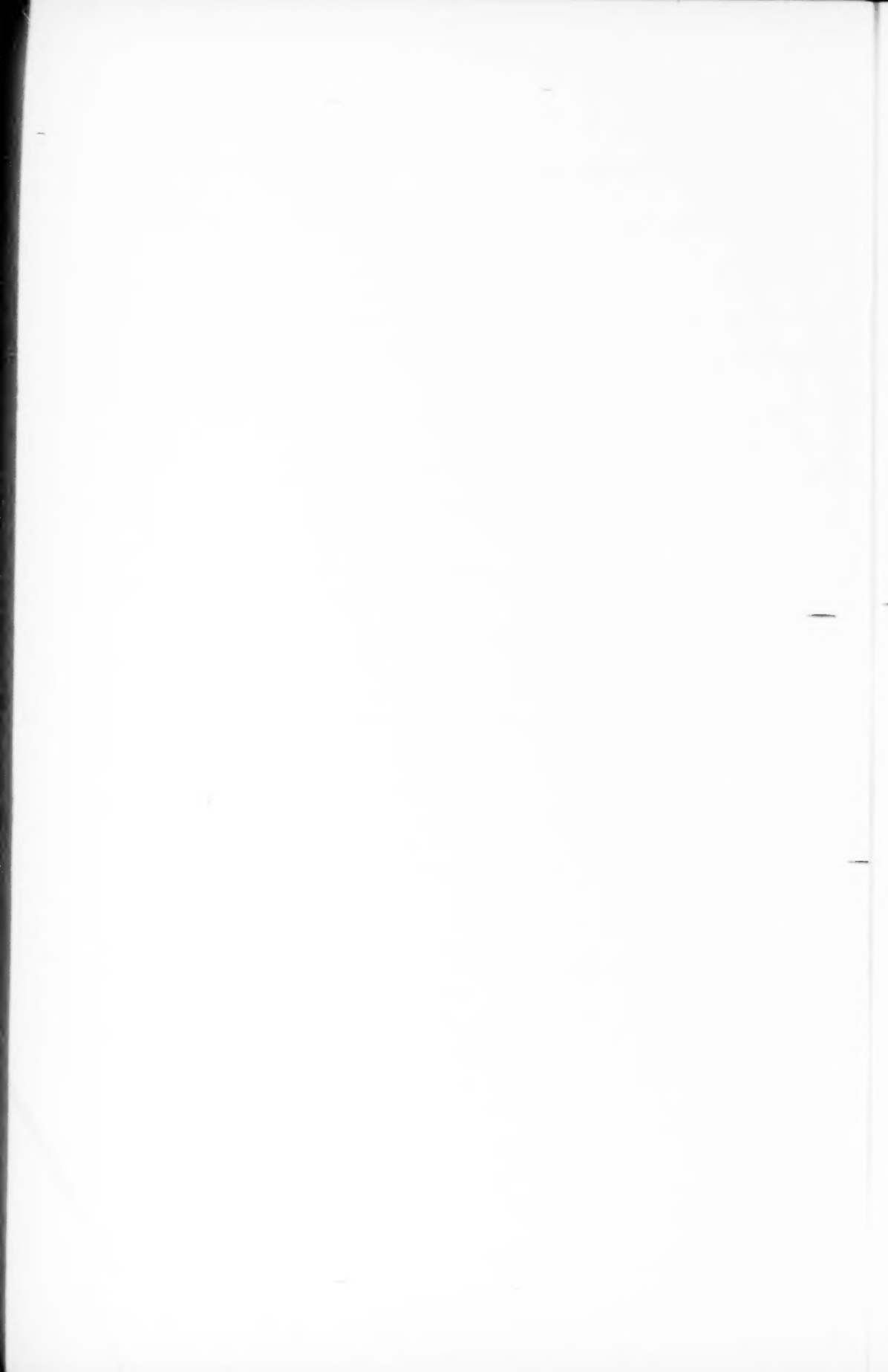
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BRIEF AMICUS CURIAE OF THE  
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IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE

Amici curiae are 33 federally  
recognized Indian tribes.<sup>1/</sup> Amici  
have a substantial interest in the  
resolution of the issues raised by  
petitioners in this case. The issues

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<sup>1/</sup>Counsel for petitioners and  
counsel for respondents have consented  
to the filing of the brief of amici in  
support of petitioners. The consents  
are submitted herewith.

involve the scope of 42 U.S.C. §1983 and the interrelationship between that statute and the rights, privileges, and immunities of American Indian tribes under federal law.

Some amici tribes are now seeking attorneys' fees in federal courts under 42 U.S.C. §§1983 and 1988. All amici are concerned about the body of law holding that §§1983 and 1988 are not available to American Indian tribes to enforce their rights under federal treaty, statutory, and common law. Amici are convinced that their ability to protect their federal rights from state deprivation will be severely limited by the unavailability of attorneys' fees under §§1983 and 1988.

The decision of the Ninth Circuit Court of Appeals particularly prejudices those tribes whose access to legal assistance is indispensable but



restricted by their poverty. It also harms tribes in cases where tribal enforcement of the rights is essential because the federal trustee, either through choice or neglect, fails to defend the integrity of the trust confirmed in treaties, statutes and court decisions. Additionally, federal resources are increasingly limited. Finally, cases to vindicate treaty rights affecting important resources of an area may take years to complete because of the extreme sensitivity of the issues. Such cases are especially draining on normally scarce tribal resources.

#### REASONS FOR GRANTING THE WRIT

- I. THE NINTH CIRCUIT IGNORED THIS COURT'S TEST FOR DETERMINING THE ACTIONABILITY OF CLAIMS UNDER 42 U.S.C. §1983.

In Maine v. Thiboutot, 448 U.S. 1 (1980), this Court held that 42 U.S.C. §1983, which provides civil remedies for

deprivation under the color of state law of any "rights, privileges, or immunities secured by the Constitution and laws," protects all federal rights. 448 U.S. at 4-8 (emphasis added). The phrase "and laws" was not to be limited to a particular subset of laws.<sup>2/</sup>

Subsequently, this Court decided Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1 (1981); Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981); and Wright v. City of Roanoke Redevelopment and Hous. Auth., 479 U.S. \_\_\_\_\_, 107 S.Ct. 766 (1987). These cases suggest two possible exceptions to the holding of Thiboutot. First, rights for which

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<sup>2/</sup>Of course, Indian treaties have long been recognized to be "the laws" of the United States. See, e.g., Antoine v. Washington, 420 U.S. 194, 204 (1975); see also Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 663 F.Supp. 682, 688 (W.D. Wis. 1987) (Indian treaties are federal laws within the meaning of §1983).

Congress has provided special remedies exclusive of other remedies are not within §1983. Sea Clammers. Second, rights which are not judicially enforceable are not actionable under §1983. Judicial enforcement of rights is impossible where there is no private cause of action to enforce obligations under the statute in question, Pennhurst, or where the statute supplies no standards of enforcement or performance binding upon the state, Wright.

None of these narrow exceptions apply to the tribal rights vindicated in this case.<sup>3/</sup> First, there is no applicable exclusive remedial scheme. Second, the Tribes' treaty rights are judicially enforceable. The Tribes'

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<sup>3/</sup>"It is not disputed that the Indians [have] rights under the[ir] treat[ies]." United States v. Washington, 813 F.2d 1020, 1023 (9th Cir. 1987).

rights of action under their treaties are beyond question. Moreover, standards of enforcement or performance are superfluous where the basic issue is the viability and scope of tribal treaty rights, and where the duty of third parties is one of non-performance; that is, a duty of absolute non-interference with the treaty rights as defined by the treaty and judicial decisions.

Accordingly, under this analysis, the Tribes' rights should have been held actionable under §1983. Instead, as Petitioners point out,<sup>4/</sup> the Ninth Circuit overlooked all of the controlling cases of this Court, and rendered §1983 unavailable to Indian tribes seeking to vindicate treaty rights.

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<sup>4/</sup>See Pet. Br. at 38-39.

II. THE NINTH CIRCUIT MISAPPREHENDED  
THE NATURE OF THE TRIBES' RIGHTS  
AND THE STATE'S CORRESPONDING DUTY;  
THIS COURT'S DECISION IN FISHING  
VESSEL; AND THE DUTY OF THE COURT  
ITSELF.

The Ninth Circuit erroneously characterized the Tribes' claims as rights of fish quantification, or apportionment. The court then found that apportionment rights, as articulated in Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) ("Fishing Vessel"), lacked sufficient specificity to support a finding that the state had breached an obligation actionable under 42 U.S.C. §1983. United States v. Washington, 813 F.2d at 1023. This analysis was incorrect for three reasons.

First, the viability of the Tribes' treaty rights was initially at issue in United States v. Washington, 384 F.Supp.

312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976) ("Phase I"). In Phase I, the Tribes first confirmed that their rights, express in the treaties, to take fish were special rights different from those of other state citizens and defined by reference to the special interests of the Tribes. However, in denying attorneys' fees, the Ninth Circuit completely ignored Phase I, and narrowly focused on the collateral apportionment rights addressed in Fishing Vessel.

Second, even if the question of the actionability of the rights under §1983 is informed by the decision in Fishing Vessel, that case was not merely or even principally an apportionment case. It was first and foremost a case confirming the viability of the Tribes' special rights to take fish. This Court

rejected the State's argument that such special tribal rights were illusory or unconstitutional. Accordingly, the bulk of the decision in Fishing Vessel addressed the conflict between the State's position and the plain language and previous judicial interpretations of the treaties. See 443 U.S. at 674-685. Apportionment rights were merely a corollary of this central holding.<sup>5/</sup>

Third, apportionment presents issues that go to the scope of the

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<sup>5/</sup>The Ninth Circuit's mischaracterization of Fishing Vessel as solely an apportionment case is further evidenced by the fact that Fishing Vessel did not fully resolve the apportionment issues. This Court reserved the hatchery apportionment issues for further proceedings. The hatchery issues were subsequently addressed in United States v. Washington, 506 F.Supp. 187 (W.D. Wash. 1980) ("Phase II"), aff'd in part and rev'd in part, 694 F.2d 1374 (9th Cir. 1982), on rehearing aff'd in part and vacated in part, 759 F.2d 1353 (9th Cir. 1985), cert. denied, 474 U.S. 994 (1985).

treaty rights involved and not to standards of performance in the sense used by this Court in Wright. Rather, a decision on apportionment is an exercise of a court's traditional power to define the extent of a pre-existing federal right with which a state may not interfere. Legislative standards of performance are irrelevant to issues of the scope of a federal right to be free from state interference.

Accordingly, the Ninth Circuit erred in characterizing the Tribes' action as principally one of apportionment rights, and in treating apportionment rights as presenting issues of standards of state performance rather than issues of the scope of the Tribes' right to be insulated from state interference.



III. THE NINTH CIRCUIT ERRED IN DENYING ATTORNEYS' FEES FOR THE TRIBES' SUCCESSFUL CONSTITUTIONAL CLAIMS.

Amici adopt the position of Petitioners that the decision of the Ninth Circuit, holding that the Tribes' properly pled and successful constitutional claims were nevertheless insubstantial and therefore fail to support a fee award, is in fundamental conflict with the principles of §1983 and decisions of this Court.<sup>6/</sup> Contrary to the opinion of the Ninth Circuit, the instant §1983 case presents a classic situation warranting an award of reasonable attorneys' fees. Not only were the constitutional claims successful in the district court,<sup>7/</sup>

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<sup>6/</sup>Pet. Br. at 51-58.

<sup>7/</sup>See Phase I, 384 F.Supp. at 401-04. Merely because these holdings were not appealed by the State does not render them "insubstantial" for purposes of a fee award.

but, as this Court noted, "[b]ecause of the widespread defiance of the District Court's orders, this litigation has assumed unusual significance." Fishing Vessel, 443 U.S. at 674.

In 1978, following Phase I, the district court was forced to invoke broad contempt powers to enforce its orders because of the "total intransigence" of defendants acting under color of state law. Puget Sound Gillnetters Ass'n v. United States District Court, 573 F.2d 1123, 1130 (9th Cir. 1978), aff'd, modified and remanded sub nom. in Fishing Vessel. As the Ninth Circuit stated in upholding the district court's enforcement action:

The state's extraordinary machinations in resisting the decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegregation cases the district

court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century.

573 F.2d at 1126 (citations omitted),  
quoted in Fishing Vessel, 443 U.S. at  
696 n.36.

Moreover, in denying attorneys' fees, the Ninth Circuit erred by ignoring a significant component of the Tribes' constitutional rights. The court focused on the rights to procedural due process (e.g., right to a hearing before nets are destroyed or removed), and equal protection,<sup>8/</sup> which were but two facets of the Tribes' constitutional rights in this litigation. The case also confirms the implicit substantive rights that were violated by the State.

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<sup>8/</sup>See United States v.  
Washington, 813 F.2d at 1024.

Phase I confirmed that the Tribes' rights to take fish were analogous to property rights. 520 F.2d at 685. Violations by the State of the rights thus essentially amounted to a regulatory taking without compensation. This aspect of the Tribes' rights was upheld by this Court in Fishing Vessel, 443 U.S. at 684-685, but was completely ignored by the Ninth Circuit in its decision below.

Under the circumstances of this case, where significant constitutional rights were at stake and were successfully vindicated against deep-seated resistance, there can be no clearer example of a situation where fees are warranted. To avoid a fee award, as the court below did, too narrowly interprets the congressional policies behind §§1983 and 1988. See Hensley v. Eckerhart, 461 U.S. 424

(1983). The purpose of these sections, to ensure effective access to the judicial process to vindicate deprivations of procedural and substantive constitutional rights, applies with full force to this case. This case, which was brought to remedy widespread official discrimination against treaty fishermen, and to halt deprivations of many aspects of their rights,<sup>9/</sup> and which, after a successful judgment, was met with "the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century,"<sup>10/</sup> is precisely the type of

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<sup>9/</sup>See Phase I, 384 F.Supp. at 388 (Findings Nos. 193-196).

<sup>10/</sup>Phase I, 573 F.2d at 1126, quoted in Fishing Vessel, 443 U.S. at 696 n.36.

action to which §§1983 and 1988 were intended to apply.

#### CONCLUSION

Congress and this Court have long secured tribal rights from deprivation by the states. To meaningfully vindicate the rights, the remedies of 42 U.S.C. §§1983 and 1988 must be available. Accordingly, the petition for writ of certiorari should be granted.

Respectfully submitted,

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